

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA**

**LAND DIVISION**

**AT DAR ES SALAAM**

**LAND REVISION NO. 30 OF 2021**

**ROSE GWAKABWIN MWAKASANDU..... APPLICANT**

**VERSUS**

**ELIAS KAJELI MAALUGU.....1<sup>ST</sup> RESPONDENT**

**KBM SONS & CO. LTD.....2<sup>ND</sup> RESPONDENT**

Last order:14/03/2022

Ruling:20/05/2022

**RULING**

**MANGO, J**

The first Respondent instituted Application No. 13 of 2018 against the Applicant seeking the Applicant's Specific performance of a sale agreement executed between him and the Applicant on 29<sup>th</sup> May 2017 and other orders relating to the alleged failure of the Applicant to perform his contractual duties. The Trial Tribunal granted the application partly and it issued the following orders: -

- i. The Respondent is ordered to discharge /liquidate the outstanding purchase price within 30 days as from the date of judgement

- ii. In case of failure of the Respondent to perform her contractual duty within the prescribed period of time, the sale agreement will be regarded as frustrated and unperformed
- iii. The Respondent will be entitled to get back her money advanced to the seller without interest
- iv. The Applicant will be entitled to get back his title deed either from the Respondent and or appointed custodian

Dissatisfied by the decision of the Trial Tribunal the Respondent appealed to this Court via Land Appeal No. 200 of 2019. The Court issued the following orders: -

- i. That the order of the trial tribunal directing the Appellant to refund the Respondent the advance purchase price in event of failure to pay the balance purchase price is set aside
- ii. The Appellant is awarded interest at the court rate of 12% per year on the balance purchase price from the date when the same was due for payment to the date of pronouncement of the judgement of the trial tribunal
- iii. The Appellant is also awarded interest at the same rate on the decretal amount from the date of pronouncement of the judgement of the trial tribunal to the date of full settlement of the decretal sum
- iv. The time schedule for payment of the balance purchase price is adjusted so that the same is paid within 60 days from the date hereof
- v. The Respondent to bear costs of prosecuting this Appeal

Aggrieved by the decision of this Court, on 12<sup>th</sup> November, 2020 the Applicant lodged a Notice of Appeal to the Court of Appeal of Tanzania. On the other hand, the Respondent approached the Trial Tribunal for execution of the decree. The Respondents' application was registered as Application No. 166 of 2021. The Executing Tribunal granted the Application and ordered eviction of the Applicant in the disputed premises. The Applicant filed this Revision application under certificate of urgency seeking the following orders: -

- i. That this Hon. Court be pleased to call and inspect the records of Misc. Land Application No. 166 of 2021 of the District Land and Housing Tribunal for Kinondoni at Mwananyamala which ordered the eviction of the Applicant while both the judgements of the District Land and Housing Tribunal and this Court have not granted the eviction order against the Applicant, if any correctness or improperness or illegality reverse the same.
- ii. Costs of this Application be provided for
- iii. Any other reliefs and directions as the Court may deem necessary to grant in the interest of justice.

The application is by way of chamber summons made under section 41(1) of the Land Disputes Courts Act, [Cap.216 of 2019], supported by an affidavit sworn by Advocate Augustine Mathern Kusalika, learned counsel for the Applicant. The Respondents contested the application and they filed a counter affidavit sworn by Advocate Irene Maira, learned counsel for the Respondents. On 6<sup>th</sup> October 2021, the Court ordered the application be

argued by way of written submissions. I am grateful to the parties for their compliance with the Court order.

Submitting in support of the Application, Mr. Kusalika, learned advocate adopted the contents of the affidavit filed in support of the Application to form part of his submission. The learned counsel challenged jurisdiction of the executing Tribunal to proceed to determine the application while it was not seized with record. He specifically argued that, once a notice of appeal has been lodged to the Court of Appeal of Tanzania, proceedings before lower courts including the executing tribunal in this case, ceases.

He also challenged the eviction order issued by the executing tribunal for being not supported by any decree in this matter. He argued that, the Trial Tribunal and this Court in Land Appeal No.200 of 2019 did not issue any eviction order. He added that, orders to be issued in execution proceedings must be supported by the decree. He is of the view that, the eviction order was issued illegally. He thus, prayed to have the proceedings of Misc. Land Application No. 166 of 2021 nullified.

In her reply submission, Ms Maira, learned counsel for the Applicant argued that, the application for execution was properly lodged before the Tribunal. She submitted that, an appeal does not operate as an automatic bar to execution. Thus, for execution to be stayed, a party need to apply for stay of execution order.

On the alleged illegality of the eviction order, learned counsel submitted that, the order was legally issued and is backed up by the decree of the tribunal in Application No. 13 of 2018. She added that, according to the

orders contained in the said decree, upon failure of the Respondent, herein Applicant, to pay the remaining balance of the purchase price, the Respondent will be entitled to be paid back the amount of money advanced to the seller without interest and the Applicant, herein Respondent, will be entitled to have his title deed returned by the Respondent or appointed custodian. She argued that, eviction order was issued as a mode of execution of the decree so that the Respondent can have his title over the property returned.

I have considered submissions by both parties and Court Record. From the submissions, it is not disputed that, during execution proceedings, Misc. Land Application No. 166 of 2021 the District Land and Housing Tribunal for Kinondoni issued an eviction order against the Applicant. The order was issued in the course of executing a decree in Land Appeal No. 200 of 2019 before the High Court of Tanzania Land Division.

The first issue in this Application which should not detain much this Court, is whether filing of execution proceedings while the Applicant had already lodged a notice of appeal is proper. It is well established that an appeal does not bar execution. A party seeking stay of execution, need to apply for such orders to the executing Court as provided under Order XXI Rule 24(1) of the Civil Procedure Code, [ Cap 33 R.E 2019]. The Court of Appeal of Tanzania in **Jonas Bathwel Temba Versus Paul Kisamo and Frank Manjuu**, Civil Application No. 17 of 2014, Court of Appeal of Tanzania at Arusha, when determining application for stay of execution, held that, *ordinarily institution of an appeal is not a bar to execution.*

The Applicant has not established that he applied and was granted an order for stay of execution by the Court, thus, the application for execution filed by the Respondent cannot be considered to be illegal.

The second issue in this application is whether eviction order was legally issued by the executing Tribunal. It is not disputed that the powers of the executing court are limited to what has been decreed. Thus, an executing Court cannot execute what has not been decreed by the Court that determined the dispute between parties as it was held by my sister, Masabo, J in the case of **Fortunata Edga Kaungua Versus George Hassan Kumburu** Misc. Appeal No. 71 of 2019.

In the case at hand, powers of the District Land and Housing tribunal for Kinondoni in Misc. Land Application No. 166 of 2021 were limited to what has been decreed by the High Court of Tanzania, Land Division in Land Appeal No. 200 of 2009. The contents of the said decree as reproduced in this ruling do not provide for eviction of the Respondent from the suit premises. The only decree which had orders that were referred to by the Respondents Counsel is the decree of the Trial Tribunal which was varied by the decree in Land Appeal No. 200 of 2019. In such circumstances, I find the executing tribunal to have acted beyond its powers which is legally incorrect.

For that reason, I hereby set aside eviction order issued by the tribunal against the Applicant. The Application is granted to that extent. Cost of the Application be borne by the Respondent.



**Z. D. MANGO**

**JUDGE**

**20/05/2022**



ORIGINAL